Supreme Court, U.S.
FILED
JAN 18 1984
ALEXANDER L. STEVAS,
CLERK

(1)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALASKA AIRLINES, INC., *et al.*,
Petitioners,

v.

WILLIAM E. BROCK, Secretary of Labor, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENT
ASSOCIATION OF FLIGHT ATTENDANTS

MATTHEW R. FINKELSTEIN
Counsel of Record
Association of Flight Attendants
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 328-5400

BEST AVAILABLE COPY

QUESTION PRESENTED

Is it evident that Congress would not have given the Department of Labor authority to issue regulations implementing the "right of first hire" contained in section 43 of the Airline Deregulation Act of 1978, 49 U.S.C. app. § 1552 (1982), absent the legislative veto in that section?

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... (i)

TABLE OF CONTENTS ..... (iii)

TABLE OF AUTHORITIES ..... (v)

SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. CONGRESS WOULD HAVE PASSED THE FIRST-HIRE PROGRAM WITHOUT THE VETO BECAUSE IT HAD A STRONG COMMITMENT TO LABOR PROTECTION, HAD NO SPECIFIC RESERVATIONS ABOUT THE FIRST-HIRE PROGRAM, AND PLACED LITTLE EMPHASIS ON THE LEGISLATIVE VETO 5

A. The Test For Severability 5

1. Presumptions of Severability 5

2. The Court of Appeals Test 8

B. Congress Was Deeply Committed To Labor Protection 10

C. Congress Had No Specific Concerns About The First-Hire Plan, In Contrast To The Compensation Plan 17

D. Congress Did Not Place Great Emphasis On The Legislative Veto, And What Importance It Had Related To The Compensation Program 19

E. Petitioners' Arguments About The Veto Are Unsupported By The Legislative History 21

Page

II. THE LANGUAGE AND STRUCTURE OF THE STATUTE SUGGEST THAT THE VETO WAS NOT AN INTEGRAL PART OF THE FIRST-HIRE PROGRAM 23

A. The First-Hire Program Is Specific And Left No Important Issues For The Secretary To Decide 23

B. The First-Hire Program Is Not Integrally Related To The Compensation Program 25

C. The Presence Of The Veto Is Not Significant In And Of Itself 26

D. Congressional Review Procedures Are Unique But Weak 26

CONCLUSION 27

TABLE OF AUTHORITIES

Cases	Page
Air Line Pilots Association v. Department of Transportation, No. 85-1178 (D.C. Cir. May 16, 1986)	11
Alaska Airlines, Inc. v. Donovan, 766 F.2d 1550 (D.C. Cir. 1985)	*passim*
Brotherhood of Maintenance of Way Employees v. United States, 366 U.S. 169 (1961)	10
Buckley v. Valeo, 424 U.S. 1 (1976)	5
Champlin Refining Co. v. Corporation Commission, 286 U.S. 210 (1932)	5
Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983)	*passim*
McDonald v. Piedmont Aviation, Inc., 625 F. Supp. 762 (S.D.N.Y. 1986)	25
Muller Optical v. EEOC, 743 F.2d 380 (6th Cir. 1984)	6
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)	5
Regan v. Time, Inc., 104 S. Ct. 3262 (1984)	5
Tilton v. Richardson, 403 U.S. 672 (1971)	5
United States v. Lowden, 308 U.S. 225 (1939)	9
Western Airlines v. C.A.B., 194 F.2d 211 (9th Cir. 1952)	11

Page

Statutory Provisions

Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified in scattered sections of 49 U.S.C. app. (1982)) ..... *passim*
Section 43, 49 U.S.C. app. § 1552 (1982) (Employee Protection Program) ..... *passim*

Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (codified as amended in scattered sections of 49 U.S.C. app. (1982)) 6

49 U.S.C. app. § 1301 6

Impoundment Control Act of 1974, 2 U.S.C. §§ 681-88 (1982) 7

Rail Passenger Service Act of 1970, 45 U.S.C. § 565 (1982) 10, 11, 16

Rail Revitalization and Regulatory Reform Act of 1976, 45 U.S.C. § 836 (1982) 11

Regional Rail Reorganization Act of 1973, Pub. L. 93-236, Title V. § 505, 509, 87 Stat. 1015, 1020 (formerly 49 U.S.C. §§ 775, 779) (repealed) 11

Reorganization Act of 1977, 5 U.S.C. §§ 901-02 (1982) 7

Transportation Act of 1940, Act of September 18, 1940, c. 722, 54 Stat. 906, 907, 49 U.S.C. § 11347 (1982) (formerly codified at 49 U.S.C. § 5(2)(f)) 10, 16

Agency Decisions

Allegheny-Mohawk Merger Case, 59 C.A.B. 22 (1972) 11

St. Paul Bridge and Terminal Railway Co. Control, 199 I.C.C. 588 (1934) 10

United-Capitol Merger Case, 33 C.A.B. 307 (1961) 11

Page

United-Western, Acquisition of Air Carrier Property, 11 C.A.B. 701 (1950) *aff'd sub nom. Western Airlines v. C.A.B.*, 194 F.2d 211 (9th Cir. 1952) 11

Legislative Materials

H.R. 8813, 95th Cong., 1st Sess. (1977) 12

H.R. 12611, 95th Cong., 2d Sess. (1978) 16

S. 689, 95th Cong., 1st Sess. (1977) 13

S. 2493, 95th Cong., 2d Sess. (1978) ..... *passim*

H.R. Rep. No. 1779, 95th Cong., 2d Sess. (1978) 17

S. Rep. No. 631, 95th Cong., 2d Sess. (1978) ..... *passim*

Aviation Regulatory Reform: Hearings Before the Subcomm. on Aviation of the Comm. on Public Works and Transportation on H.R. 8813, 95th Cong., 1st Sess. (1977) 12

Regulatory Reform in Air Transportation: Hearings Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science, and Transportation on S. 292 and S. 689, 95th Cong., 1st Sess. (1977) 13

124 Cong. Rec. 10649 (1978) 20

124 Cong. Rec. 10674 (1978) 18

124 Cong. Rec. 10675 (1978) 18

124 Cong. Rec. 10676 (1978) 18

124 Cong. Rec. 10678 (1978) 19

124 Cong. Rec. 10679 (1978) 18

124 Cong. Rec. 10680 (1978) 19

Page

124 Cong. Rec. 10681 (1978) 19

124 Cong. Rec. 10682 (1978) 16, 18

124 Cong. Rec. 10683 (1978) 18

124 Cong. Rec. 38524 (1978) 21

124 Cong. Rec. 38525 (1978) 17

Miscellaneous

Blumberg, *Collective Layoffs; Protection of Employees Against Dismissal or Displacement as a Result of Mergers, Closings, or Work Transfers*, 26 Am. J. Comp. L. 277 (Supp.) (1978) 10

Note, *Resolving Challenges to Statutes Containing Unconstitutional Legislative Veto Provisions*, 85 Colum. L. Rev. 1808 (1985) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-920

ALASKA AIRLINES, INC., *et al.*,
Petitioners,

v.

WILLIAM E. BROCK, Secretary of Labor, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

BRIEF FOR RESPONDENT ASSOCIATION OF FLIGHT ATTENDANTS

SUMMARY OF ARGUMENT

The unconstitutional one-house veto in section 43 of the Airline Deregulation Act of 1978, 49 U.S.C. § 1552 (1982), should be severed from the first-hire provisions challenged in this case since both the legislative history and the structure of section 43 provide overwhelming evidence that Congress would have passed the exact first-hire program absent the veto. In addition, several presumptions of severability apply. The evidence to support severability is so strong that severability can be found under any reading

of this Court's decision in *Immigration and Naturalization Service v. Chadha,* 462 U.S. 919 (1983).

Congress has been providing labor protections in transportation industries for over 50 years, and the legislative history overflows with statements of congressional concern about the need to protect airline workers from the brave new world of airline deregulation. Sentiment favoring labor protection was strong in both chambers, and both the House and Senate passed generous bills patterned after protections provided railroad workers during governmentally caused changes to their industry.

The Senate committee report on the provisions which, with some modifications, became section 43 explained that Congress felt an almost moral obligation to protect airline workers who had for forty years relied on a totally regulated airline system. The committee even suggested that the public could not have the benefits of deregulation without providing for labor protection. S. Rep. No. 631, 95th Cong., 2d Sess. 113-15 (1978). Perhaps the most striking example of the depth of support for labor protection was the 85 to 7 defeat of an amendment introduced by Senator Hatch to delete the labor protection provisions from the primary deregulation bill.

The only reservations Congress had about protecting labor concerned a compensation program that some Senators felt could cost more than a billion dollars a year, and the Senate committee report's discussion of the veto ties it to the compensation program. *Id.* at 116. In contrast, it is virtually impossible to find a specific criticism of the first-hire proposal. If there are any congressional statements with the first-hire program as the subject, and a criticism of it as the predicate, Petitioners have failed to produce them.

There is nothing in the legislative history to suggest that the veto was ultimately considered of great importance, *even* to the compensation program which could always be controlled through appropriations. In the debate in the Senate concerning the compensation program, neither the proponents nor the opponents of compensation cited the veto. Outside of the discussion in the Senate report tying the veto to the compensation program, the only other extended comment on the veto in the entire legislative history came from Representative Levitas who, after the bill had returned from conference, noted that it was a good thing that the bill, like other statutes that year, contained a veto. Since Levitas had earlier introduced a bill with a stronger labor protection provision, but without a veto, it is unlikely that even he considered the veto integral to section 43.

Petitioners' efforts to come up with reasons why Congress might have felt the veto was important to the first-program seem strained. The suggestion that Congress was motivated to include the veto by misgivings about turning the program over from the Department of Transportation to the Department of Labor, Brief for Petitioners at 38-39, does not make sense since the House wanted DOT to implement the program precisely because it was pro-labor. The theory that Congress wanted a veto because it was concerned that the Department of Labor regulations might "thwart the Deregulation Act's overall purpose by overburdening covered carriers," Brief for Petitioners at 30, is unsupported by any remarks in the legislative history or any possible explanation of how the innocuous first-hire program could bring down the Deregulation Act.

In addition, the theory that the House wanted a veto because the conference chose a Senate approach to em-

BEST AV

ployee protection that was "unprecedented in design and scope," Brief for Petitioners at 43 n.53, does not make sense in light of the fact that the conference bill was weaker than the House bill. And the theory that congressional control over the first-hire program was increased in conference because the first-hire program was made less clear, Brief for Petitioners at 41, overstates the conference change, and ignores a better explanation for the increased control – Senate misgivings over loosening up the compensation program.

The structure of the Act also demonstrates that the veto was not an integral part of the first-hire program. Section 43 specifies in great detail who is eligible and what they are eligible for, and leaves no important details for the Secretary of Labor to decide in issuing regulations. Moreover, while the statute instructs the Secretary of Labor to issue regulations concerning the compensation program, no such requirement exists concerning the arguably self-implementing first-hire program. If the regulations were supposed to decide some issues of crucial interest to Congress, Congress would have mandated that regulations be issued.

Petitioners' arguments about the structure of the Act – that section 43 was the only provision with a veto, and that section 43 contains a unique combination of review procedures – are without merit. The first argument says little more than that the veto is important because it is there, and the second ignores the fact that the review provisions, although unique, are mild in comparison to some other statutes.

AILABLE COPY

ARGUMENT

I. CONGRESS WOULD HAVE PASSED THE FIRST-HIRE PROGRAM WITHOUT THE VETO BECAUSE IT HAD A STRONG COMMITMENT TO LABOR PROTECTION, HAD NO SPECIFIC RESERVATIONS ABOUT THE FIRST-HIRE PROGRAM, AND PLACED LITTLE EMPHASIS ON THE LEGISLATIVE VETO.

A. The Test For Severability

Whether an unconstitutional provision is severable is largely a question of legislative intent. *See Regan v. Time, Inc.*, 104 S. Ct. 3262, 3269 (1984). This argument therefore focuses on the legislative history and the structure of the Deregulation Act, which together clearly demonstrate that Congress would have passed section 43 without the veto.

1. *Presumptions of Severability*

Although the intent of the legislature is clear in this case, several presumptions of severability also apply. First, there is an implicit presumption of severability in *Chadha's* requirement of severance "unless it is evident" that Congress would not have passed the bill without the veto, 462 U.S. at 931-32 (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (quoting *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932)), as opposed to a requirement of inseverability unless it is evident that Congress would have passed the bill without the veto. This implicit presumption is in keeping with this Court's view that "The cardinal principle of statutory construction is to save and not to destroy." *Tilton v. Richardson*, 403 U.S. 672, 684 (1971) (plurality opinion) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937)).

Second, "[a] provision is further presumed severable if what remains after severance 'is fully operable as a law.'"

Chadha, 462 U.S. at 934. The operability of the detailed first-hire provisions in section 43 is attested to, both empirically and conceptually, by the fact that the Department of Labor first-hire program is now in effect.

Third, severability is also presumed where there is a severability clause. *Id.* at 932. The Deregulation Act is expressly an act to amend the Federal Aviation Act of 1958, Pub. L. No. 95-504, 92 Stat. 1705, 1705, which in turn contains a severability clause. 49 U.S.C. app. § 1301. Although section 43 does not itself amend a specific section of the Federal Aviation Act, it was an integral part of the Deregulation Act and there is no evidence that Congress had fewer concerns about saving the first-hire program from constitutional challenge than it did about saving other portions of the Deregulation Act.

There are other important reasons to presume severability in this case. This case involves a statutory provision passed six years before this Court's unexpected conclusions in *Chadha,* and severance would work a severe and inequitable hardship on the unemployed airline workers who are obtaining jobs under the first-hire program. The veto was never exercised in this case, and thus there has not been any direct offense to the principles of bicameralism and presentment. *Cf. Muller Optical Co. v. EEOC,* 743 F.2d 380, 386-88 (6th Cir. 1984) (mere existence of unexercised veto not unconstitutional where delegation of authority provides sufficient standards to executive branch) (challenged regulations issued prior to *Chadha*). Although the first-hire regulations were issued after the decision in *Chadha,* and Congress could not have exercised a valid one-house veto, Congress has had ample time to take some valid action, particularly since the regulations were sent to Congress under report-and-wait procedures.

Instead, Congress has greeted the regulations with total indifference, and there is no controversy in this case between the Congress and the executive. Moreover, this case does not involve a statute that would be otherwise constitutionally suspect absent the veto. Nor does it involve a broad delegation of authority such as the Impoundment Control Act of 1974, 2 U.S.C. §§ 681-88 (1982), or the Reorganization Act of 1977, 5 U.S.C. §§ 901-02 (1982). *See generally* Note, *Resolving Challenges to Statutes Containing Unconstitutional Legislative Veto Provisions,* 85 Colum. L. Rev. 1808, 1824-27 (1985) (severability should be presumed in cases of narrowly delegated rulemaking authority, such as section 43, and inseverability should be presumed where statutes broadly delegate authority, such as the Impoundment Control Act).

The underlying controversy in this case is not between the branches of government, but between the 95th Congress, which decided that carriers should hire certain employees, and the airlines, who do not want to hire these employees. The proper forum for this challenge was through lobbying in 1977 and 1978. Unable to convince Congress in 1978, Petitioners now claim injury because regulations are in effect which Congress might have challenged had the veto been constitutional. This injury is speculative and remote, particularly since Petitioners' real problem is with a policy Congress has already decided. Where injury to the Constitution and to the Petitioners is tenuous, severability should be presumed.

Even without these presumptions, the legislative intent is clear enough to warrant severability. This clear legislative intent also leads to severability regardless of how *Chadha's* test for severability is interpreted, a subject of discussion in the courts below.

2. *The Court of Appeals Test*

Petitioners argue that the Court of Appeals incorrectly required a showing that "Congress would have preferred no airline employee protection provision at all to the existing provision *sans* the veto," and inappropriately excluded evidence that Congress would have passed some other bill without the veto. Brief for Petitioners at 15-16, 26-28. This argument misreads the Court of Appeals decision. After explicitly stating that it was following *Chadha,* the Court of Appeals appears to say that realistically, it has two choices when confronted with a statute with a veto. It can strike down the law altogether, or uphold it without the veto. Which of these choices, based on the legislative history, would Congress have preferred? Whether Congress would have preferred no bill at all, the question which Petitioners claim is inappropriate, appears in this Court's analysis in *Chadha.* For in finding severability, this Court placed emphasis on the fact that "there is insufficient evidence that Congress would have continued to subject itself to the onerous burden of private bills had it known that § 244(c)(2) would be held unconstitutional." 462 U.S. at 934. In other words, there was insufficient evidence in *Chadha* that Congress would have preferred no bill at all, which would have meant a return to private bills to prevent deportation.

The Court of Appeals did not exclude evidence that Congress might have passed a different bill, it simply found it unpersuasive. For example, after evaluating the legislative history, the Court of Appeals simply found "no evidence that the House's agreement to the Senate version of the protection plan was given in exchange for beefing up the veto device." . . . "Nor have we found any indication that the Senate's agreement to the minor modifications in its version was premised on a 'strengthening' of the

veto provision." 766 F.2d at 1565 (27a-28a). Thus, the Court of Appeals did not exclude evidence from consideration, it simply could not find the evidence to which Petitioners refer.

Nor is there anything inherent in the Court of Appeals severability test that would exclude from consideration evidence that Congress was interested in alternative bills. In this regard, the Court of Appeals decision could be read to say that: "Assuming that Congress might have expressed interest in alternative bills without the veto, would it *nevertheless* have passed this exact statute if the choice were this exact statute or no bill at all?" Under this reading, an expressed congressional preference for an alternate bill, if compelling enough, might in some cases provide evidence that Congress would have preferred no bill at all to the bill without the veto. In other words, it would provide evidence that Congress would not have passed the bill *sans* veto. *Chadha,* 462 U.S. at 931-32. The existence of congressional preferences for alternatives is always an issue for the court, it is simply not the ultimate issue.

In contrast, the District Court and Petitioners seem to consider the issue of preference for alternative legislation to be the ultimate issue. Brief for Petitioners at 14-15. Petitioners suggest that unless it can be shown that Congress would not have changed one word without the veto, inseverability is required. This would be true even if Congress, faced with the choice, would have preferred the bill that passed to no bill at all. This exacting standard, if it is indeed what the District Court is suggesting, would doom all laws with legislative vetoes unless it was evident that the vetoes were totally superfluous. But since the veto in the first-hire program before this Court is superfluous, as will be discussed in the detailed discussion of the legislative his-

tory that follows, the program should survive under even the exacting District Court standard.

B. Congress Was Deeply Committed To Labor Protection

Since the federal government had provided labor protection provisions for railroad workers for over half a century[1] and in the aviation industry for over thirty

[1]The Interstate Commerce Commission began requiring labor protections in approved transactions in 1934 in the case of *St. Paul Bridge and Terminal Railway Co. Control,* 199 I.C.C. 588 (1934). Its authority to do so was upheld in the case of *United States v. Lowden,* 308 U.S. 225 (1939). In that case, the I.C.C. approved the lease of a railroad on condition that retained employees be compensated for five years for loss of salary and dismissed employees be partially compensated for their losses.

In an effort to head off federally controlled unification of the railroads, the railroads and unions entered into the Washington Job Protective Agreement of 1936. That agreement provided, among other things, that employees affected by consolidation would receive five years of supplementary compensation if they were placed in lower paying jobs, and would receive 60% of their salary for up to five years, depending on length of service, if they lost their jobs. Blumberg, *Collective Layoffs: Protection of Employees Against Dismissal or Displacement as a Result of Mergers, Closings, or Work Transfers,* 26 Am. J. Comp. L. 277, 278 (Supp.) (1978) (citation omitted).

Explicit and comprehensive statutory labor protection provisions were codified in 1940 when the Transportation Act of 1940, 54 Stat. 906, 907 brought section 5(2)(f) into the Interstate Commerce Act (now codified at 49 U.S.C. § 11347 (1982)). Section 5(2)(f) instructs the I.C.C. to require "a fair and equitable arrangement" to protect the interests of the railroad employees affected by mergers and to "include terms and conditions providing that during the period of four years from the effective date of such order such transactions will not result in employees . . . being in a worse position with respect to employment . . . ." *Id.* Monetary compensation, and not a job freeze, is adequate to meet this requirement. *Brotherhood of Maintenance of Way Employees v. United States,* 366 U.S. 169, 173-178 (1961).

In a major step beyond merger protection, The Rail Passenger Service Act of 1970, which led to the creation of Amtrak, stated that

years,[2] it was virtually inevitable that both the House and the Senate would include labor protection provisions in

---

railroads had to provide "fair and equitable arrangements" to protect employees affected by route discontinuations. These arrangements had to be approved by the Secretary of Labor and were to be no less than those provided for in section 5(2)(f) of the Interstate Commerce Act. 45 U.S.C. § 565 (1982). As discussed above, section 5(2)(f) set a *floor* of at least four years of monetary compensation.

Further statutory protections were provided in the Regional Rail Reorganization Act of 1973 which was designed to reorganize and operate the failing Northeastern rail system. Pub. L. 93-236, Title V. §§ 505, 509, 87 Stat. 1015, 1020 (formerly 49 U.S.C. §§ 775, 779) (repealed). Its provisions were "reaffirmed and expanded to cover railroads on a national, rather than regional basis" by the Rail Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 836 (1982). *Blumberg, supra* at 10 this note.

[2]Labor protection provisions have been provided in the airline industry since at least 1950, primarily in merger cases since the C.A.B. preferred to avoid airline bankruptcies by seeking merger partners for failing airlines. *United-Western Acquisition of Air Carrier Property,* 11 C.A.B. 701 (1950), *aff'd sub nom. Western Airlines v. C.A.B.,* 194 F.2d 211 (9th Cir. 1952). The authority for requiring merger protections continued up to and through the passage of the Airline Deregulation Act. A relatively standard formula for employee protection was initiated in 1960 including four years of supplemental compensation for those whose new jobs are at a lower salary; a "dismissal allowance" for up to five years for those who lose their jobs, depending on the length of employment; and a fair and equitable integration of seniority lists. *United-Capital Merger Case,* 33 C.A.B. 307, 342-347 (1961), *Allegheny-Mohawk Merger Case,* 59 C.A.B. 22, 31-40 (1972).

Labor protection provisions in airline mergers have fallen into disfavor with the federal government since deregulation. In *Air Line Pilots Association v. Department of Transportation,* No. 85-1178, (D.C. Cir. May 16, 1986), the Court of Appeals upheld the Board's refusal to impose labor protections except in rare cases under a policy that labor protections were not in the spirit of deregulation. Slip. op. at 4-7. The court did note that "Congress could seek to spur deregulation while also attempting to lessen the blow on existing employees; in fact, it did just that in Section 43 of the Airline Deregulation Act . . . ." Slip. op. at 9.

the deregulation bills that were introduced and passed in the 95th Congress.

On the House side, a bill providing federally financed compensation for employees adversely affected by deregulation was introduced in the first session of the Congress. H.R. 8813, 95th Cong., 1st Sess. § 27 (1977). The bill was left "very broad, very loose" by its sponsor, Representative Anderson, because the implementing regulations were to be written by the pro-labor Secretary of Transportation, Brock Adams.[3]

---

[3]Representative Anderson testified:

> On the other one, the one for labor, we actually wanted to get something in there so that we can discuss it.
>
> But we put this in there kind of directing the Secretary of Transportation, Brock Adams – *again, he is the very man whose record in the past has been very, very prolabor,* and we instructed him to study this area so that there can be protections if there is going to be any problem, and we did leave it very broad, very loose.

Aviation Regulatory Reform: Hearings Before the Subcomm. on Aviation of the Comm. on Public Works and Transportation on H.R. 8813, 95th Cong., 1st Sess. 1022 (1977) (hereinafter cited as "House Hearings on H.R. 8813") (emphasis added).

Petitioners cite this quote, without the italicized portion using ellipsis marks, to suggest that the veto was added when control of the program was "transferred" from the Secretary of Transportation to the unfamiliar Department of Labor. Brief for Petitioners at 38 n.46 and accompanying text. But since the quote indicates a desire for a pro-labor agency to administer the statute, it is not clear what fears the House could have had about the Secretary of Labor. Representative Anderson reiterated his belief that the Secretary of Transportation would be favorable to labor in response to a complaint by a union witness that: "In other words, it could be a payoff of 1 year; it could be a payoff of 5 years; it could be nothing more than moving expenses. We do not have those answers." Anderson responded: "I again would feel, my feeling was – I suppose I was thinking of Brock Adams, who has a very good labor relations background in the Seattle area; and he is our Secretary and I suppose he and President Carter will be in at least for the next 3 years and our bill stops in 5 years." *Id.* at 1024.

On the Senate side, the primary deregulation bill during the first session, S. 689, contained no labor protection provision, but only because the bill sponsors, Senators Cannon and Kennedy, felt that deregulation would not lead to a loss of jobs.[4] Administration witnesses also expressed doubt that deregulation would lead to fewer jobs, but expressed support for labor protection provisions if necessary.[5]

---

[4]Senator Kennedy stated: "The fear that airline employees will lose jobs because of regulatory reform has no evidence to support it anymore than the allegation that towns will lose service." *Regulatory Reform in Air Transportation: Hearings Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science, and Transportation on S. 292 and S. 689,* 95th Cong., 1st Sess. 110 (1977) (hereinafter cited as "Senate Hearings"). Senator Cannon elaborated on this point in response to one witness: "But by saying there's going to be a loss of jobs, you are saying the free enterprise system won't work. What we are saying is that if you give the free enterprise system a chance . . . you are really going to promote more business." *Senate Hearings* at 1844.

[5]Charles Schultze, Chairman of the Council of Economic Advisers, expressed President Carter's concern over labor, stating: "In his message to the Congress, the President made it clear that the Administration recognizes an obligation to protect the legitimate interests of airline employees." Schultze expressed doubt that unemployment would result from deregulation, but added, "[I]f a case for protection can be made, we are prepared to work together with the Congress in determining what remedies might be appropriate." *Senate Hearings* at 279.

Secretary of Transportation Brock Adams echoed these sentiments, stated:

> We must not disregard the possible problems of the working men and women who have invested their lives in this industry. This is already provided for in merger cases. We should consider carefully what might occur in the event there is a failure in the system causing significant unemployment.
>
> We should, together with the unions and the carriers, identify the problems that might occur and strive to find equitable solutions for them.

Id. at 1369, 1370.

In response to union testimony that protections typical of the railroad industry were needed since they provided for federally funded compensation in bankruptcies and route discontinuations, as opposed to limited airline merger protections,[6] the primary Senate bill in the second session, S.2493, contained a federally funded compensation program for airline workers. The bill included monthly assistance payments for up to three years for a narrow class of employees in certain very specific cases. The bill also contained a first-hire program.[7]

The Senate committee on Commerce, Science, and Transportation sent S. 2493 to the floor by a vote of 13 to 3 along with a detailed report explaining why Congress felt a moral commitment to protect labor in the brave new world of deregulation. Because the labor protection provisions in S. 2493 essentially became section 43 of the Deregulation Act, this report is quoted here at length:

---

[6] *See, e.g., Senate Hearings* at 717 (statement of Frank E. Fitzsimmons, General President, International Brotherhood of Teamsters); *id.* at 1320 (testimony of William G. Mahoney, counsel to several airline-related unions).

[7] The bill provided:

(1) a maximum of three years of federally funded monthly assistance payments for employees with more than four years of service on the date of enactment of the bill who lost jobs or compensation on account of a bankruptcy or a 15 percent reduction in the workforce caused by, and within ten years of, the Deregulation Act;

(2) that employees receiving federal assistance payments must accept comparable work or else receive reduced benefits;

(3) that employees meeting the above eligiblity requirements have a first right of hire at any other carrier holding a certificate at the time of the Act's passage;

(4) that the Secretary of Labor would have power to issue regulations to administer the labor protection provisions; and

(5) that all rules and regulations must be submitted to Congress and would become effective 60 days after submission unless disapproved by either House. S. 2493, 95th Cong., 2d. Sess. § 22 (19078).

> The theoretical possibility that a major reduction might occur in the labor force of one or more airlines is the primary source for the serious concern expressed about this bill by many airline employees and their labor representatives. . . . The Committee concluded that the kind of employee dislocations that might occur as a result of the new regulatory structure should be dealt with by a statutory employee protection program, as has been done in certain cases in the past.
>
> . . . .
>
> . . . .
>
> . . . .
>
> . . . Many airline employes have given most of their working lives to the air transportation industry and have too much invested to leave it now. . . . Older employees looking for a new job might encounter difficulties because of their age. Since employees will not be able to adjust in the sense their employers can, the Committee believes that a reasonable program of transition assistance should be provided.
>
> . . . Because it is the public who will benefit from the regulatory reform provided for in this bill, the public should be willing to assume reasonably close to the full cost of such reform, including the cost of transition for any dislocated employees. The Committee believes that the Congress, on behalf of the American people, must insure that the benefits to the public which result from its decision to alter substantially the regulation of air transportation are not paid for by a minority – the airline employees and their families who have relied on the present system.

S. Rep. No. 631, 95th Cong,, 2d Sess. 113-114 (1978) (hereinafter cited as "Senate Report").

In addition, the report indicates that the Senate considered labor protection as a trade-off for deregulation:

> The alternatives are clear: continued regulations and thus a continuing economic loss to the public, versus decreased regulation and, therefore, decreased loss to the public, potentially paid for by a temporary assistance program.

Id. at 115. Whether this trade-off was a moral one or a political one, or both, is uncertain. But it is clear that Congress felt that labor protection was such an integral part of the total bill that it would not pass it without labor protection. It is difficult to imagine stronger evidence of a congressional commitment to a provision, but such can be found in the 85 to 7 defeat of a floor amendment by Senator Hatch to eliminate the labor protection provisions entirely from the Act. 124 Cong. Rec. 10682 (discussed *infra* at 18).

The House adopted an even more expansive employee protection provision than the Senate version in the second session. H.R. 12611, approved by the House Public Works and Transportation committee, required that workers affected by new authority were to be protected by arrangements no less favorable than those in 5(2)(f) of the Interstate Commerce Act, and section 405 of the Rail Passenger Service Act, including subsequent amendments.[8] H.R. 12611, 95th Cong., 2d Sess. § 32 (1978). Like the Senate bill, H.R. 12611 would have ensured federal monetary benefits, but lacked the Senate restrictions on eligibility and length of payments. The labor protection provisions were completely uncontroversial on the House floor.

The conference provisions, somewhat more liberal than the Senate version, but more conservative than the House

[8]A discussion of the railroad laws is included *supra* at 10 n.2.

protections,[9] passed in both the Senate and House without significant challenge, although some Congressmen felt that the bill did not go far enough. *See* remarks of Representative Mineta, 124 Cong. Rec. 38525 (1978). The inclusion of labor protection provisions in the Act was never in doubt.

C. Congress Had No Specific Concerns About The First-Hire Plan, In Contrast To the Compensation Plan

While Congress overwhelmingly supported labor protection provisions, it did have some doubts about what the provisions would be. These doubts related to the compensation program, however, and not the first-hire program.

There is a dearth of statements in the legislative history reflecting either congressional criticism of the idea of a

---

[9]Some of the major elements of the new bill were:

(1) the triggering limitation for compensation from the Senate bill was reduced from a 15 percent contraction of the workforce to a 7½ percent reduction (the House bill had no triggering limitation);

(2) the Senate limitation on all benefits to those with four years of experience was chosen over the more liberal provision in the House bill, which would have given benefits to any affected employee;

(3) the length of financial assistance payments from the Senate bill was increased from 36 to 72 months (the House had no explicit limits);

(4) a provision was added ordering the Secretary of Labor to issue the regulations implementing the monthly assistance payments plan and any other regulations he deemed necessary within six months of enactment;

(5) the triggering mechanism was eliminated from the Senate first-hire program (an industry-wide first-hire program was not present in the House bill); and

(6) a new provision was added requiring that thirty days before a rule became final it had to be submitted to the Senate Committee on Commerce, Science, and Transportation, and the House Committee on Public Works and Transportation. H.R. Rep. No. 1779, 95th Cong., 2d Sess. 48-51, 104-106 (1978).

first-hire program, or congressional concern about how such a program might be implemented. The Brief for Petitioners certainly does not cite any such criticisms.

In contrast, there was a great deal of criticism of the compensation program on the floor of the Senate where four amendments to the labor protection provisions were debated. Senator Zorinsky submitted an amendment to S. 2493 to eliminate the compensation program entirely, which would have left the first-hire program intact, citing a potential $1 billion price tag. This amendment was defeated narrowly by a vote of 43 to 48.[10] 124 Cong. Rec. 10674, 10675, 10676, 10683 (1978). Senator Hatch's attempt to *entirely* eliminate the employee protection program focused on the compensation provisions:

> I feel this provision is unwarranted and is a grossly unfair raid on the U.S. Treasury which could cost the American taxpayer in excess of $1 billion a year. Considering similar provisions in Amtrak (which has cost the taxpayers of this country $38 million since its inception in 1973) and ConRail (which has cost taxpayers $140 million since its inception in 1976), I am convinced that any concerns over the economic consequences of this provision are entirely warranted.

Id. at 10679. As noted above, the Hatch amendment was defeated by a dramatic 7 to 85. *Id.* at 10682. An amend-

[10]The remaining first-hire provision in the Zorinsky amendment would have been subject to a legislative veto. Zorinsky's action is described in the Brief for Petitioners as evidence of the importance of the veto to the first-hire program: "In fact, one proposed EPP included a veto provision applicable exclusively to the regulations implementing the duty-to-hire part of the program." Brief for Petitioners, p. 40, n.49.This statement has little weight when looked at in context, i.e. that the relationship between the veto and the first-hire provision was residual.

ment to liberalize the monthly assistance payments was defeated, and an amendment to restrict them passed. *Id.* at 10678, 10680, 10681, 10683. These four proposed amendments show that while the details of the compensation program were controversial, the merit and details of the first-hire program were not.

Over on the House side in the second session, where an even more generous bill was passed, there was no similiar hand-wringing over the labor protection provisions. The House had no specific opportunity to comment on the first-hire program until the conference bill came back containing one, and no negative comments were made. From introduction to passage, neither the House nor the Senate expressed specific reservations about the first-hire program.

D. Congress Did Not Place Great Emphasis On The Legislative Veto, And What Importance It Had Related To The Compensation Program.

The legislative veto originated in the Senate in S. 2493 and not in the House. Since the Senate was concerned about the compensation program, it follows that the importance of the veto was to maintain control over the compensation program. This deduction is affirmed by the Senate Report on S. 2493 which provides the only substantive explanation for the veto in the entire legislative history:

> Eligible employees who lost their jobs would be entitled to monthly assistance payments . . . . The amount of such payment would be equal to a percentage of former wages, as determined by the regulations promulgated by the Department

> of Labor. These regulations will be subject to congressional review.

Senate Report at 116.

Concerns over compensation may also explain why the congressional review provisions were "strengthened" in conference. The conference bill liberalized the Senate's compensation plan, and since the compensation plan was of concern to the Senate, it might be natural for the Senate to seek increased control.[11]

Although the legislative veto may, for these reasons, have been of some importance to Congress, it is doubtful that the veto and *even* the compensation plan were integrally related in the overall view of Congress. The House had never included legislative veto provisions in any of its expansive labor protection provisions. In introducing S. 2493 on the Senate floor, Senator Cannon described the labor protection provisions in his summary of the bill, but did not mention the veto provision. 124 Cong. Rec. 10649 (1978). And the veto provision never entered into the heated Senate debate over the compensation program where it might have been cited by defenders of the program if it was important. This absence of discussion probably stemmed from the fact that Congress did not ultimately need a veto to control the compensation program. It could always control it through appropriations.

Outside of the Senate report's discussion of the veto, the only other commentary came from Representative Levitas, a well-known advocate of legislative vetoes. After the conference had reported out its bill, Levitas made a passing remark that it was a good thing the bill, like some

---

[11]Even this explanation may give the veto more importance than it had. *See* the Court of Appeals' discussion of the "strengthening" of the veto, quoted *supra* at 8-9, 766 F.2d at 1565.

other bills, had a veto.[12] As Levitas had been a sponsor of the more generous House bill, H.R. 12611, which had no veto provision, it is impossible to believe that even Levitas really felt that the veto was important. Since Congress cared deeply about labor protection, had no reservations about the first-hire program, and expressed little interest in the veto, it follows that the veto was superfluous to the first-hire program.

E. Petitioners' Arguments About The Veto Are Unsupported By The Legislative History.

Petitioners' version of the veto's *raison d'etre* – that it was included by the Senate as a check when it "transferred control over the EPP to DOL," Brief for Petitioners at 38-39, that it was included out of fear that the regulation might "thwart the Deregulation Act's overall purpose by overburdening covered carriers," Brief for Petitioners at 30, that it was strengthened in conference because the first-hire program was made more vague, Brief for Petitioners at 41, and that it was used to persuade "a skeptical House to acquiesce" in the Senate's unique approach to labor protection, Brief for Petitioners at 43 n. 53, – are based on an idiosyncratic reading of the legislative history.

The Senate bill in the first session simply did not have a labor protection provision, so it is difficult to see how the Senate bill "transferred" control from DOT to DOL. It

[12]Representative Levitas stated: "Finally, Mr. Speaker, I cannot let this moment go by without making this observation. While there have been several bills sent to the President this year and signed by him which contained a provision for a congressional veto, I am happy to say that this piece of legislation contains a one-House veto over the regulations which may be issued by the Secretary of Labor on the labor protection provisions, so that the Congress and not an unelected bureaucrat will have the final word on the regulations that will have the effect of law." 124 Cong. Rec. 38524 (1978).

was the House bill in the first session that had a labor protection provision controlled by the Secretary of Transportation, and that was because he was supposed to be pro-labor. (The legislative history is discussed *supra* at 12, n. 3.) Petitioners' argument that the House would have been concerned about the liberality of the Department of Labor, when the Secretary of Transportation's pro-labor bias was considered as a plus, is self-contradicting.

Petitioners' argument that the veto was included because of fear that the Department of Labor might thwart the Deregulation Act's purpose by imposing upon pre-deregulation carriers is unsupported by any congressional statement, and it is not clear how hiring experienced airline employees over inexperienced employees could have a negative financial effect on a carrier. However, even if one were to agree that the first-hire program would have some small negative effect, this effect would result from a clear policy decision by the Congress and not as a result of some narrow discretionary matter that was left up to the Department of Labor. The DOL regulations would appear to have more of an effect on the airlines' feelings about hiring whomever they please rather than on their viability under deregulation.

The theory that the veto was strengthened in conference because the first-hire program became more vague gives the first-hire program an importance it never had. The first-hire program had to have played third fiddle, at best, to the discussion of the compensation program since this was so important to the Senate. Moreover, the first-hire program did not really become vague. Congress simply made a policy decision to eliminate the triggering mechanism.

Finally, the theory that a skeptical House somehow had to be convinced by the veto to buy what it considered a

watered-down conference version of its own program is illogical. Petitioners seem to concede the weakness of this theory when they state: "The veto therefore was necessary because section 43 was unique and untested, not because it was stronger or weaker than the EPP proposed by the House." (Brief for Petitioners at 43 n.53.) While Petitioners are correct that section 43, as finally written, was unique, it was not unique in any way that would have troubled the House. The only thing troubling the House when the bill reached the floor was that the bill had been weakened. At best, Petitioners' "uniqueness" argument might support a theory of why the House did not *object* to a legislative veto in the final bill, but not a theory of why the House would have insisted on one.

II. THE LANGUAGE AND STRUCTURE OF THE STATUTE SUGGEST THAT THE VETO WAS NOT INTEGRAL TO THE FIRST-HIRE PROGRAM.

A. The First-Hire Program Is Specific And Left No Important Issues For The Secretary To Decide.

An examination of the language and structure of section 43 reveals that the veto could not have been an essential part of the first-hire program. This is because the first-hire program is specific, and leaves no issues of importance for the Secretary of Labor to decide.

The statute defines every important aspect of the program:

(1) It defines who is eligible, namely, protected employees (a person who, on the date of enactment has been employed for at least four years by an air carrier holding a certificate issued under section 401 of the Federal Aviation Act) who are furloughed or otherwise terminated (except for cause) prior to the last day of the 10-year period beginning on the date of enactment;

(2) It defines what they are eligible for, namely, the right of first hire, regardless of age, in their occupational speciality, by any other air carrier hiring additional employees which held a certificate issued under section 401 of the Federal Aviation Act of 1958 prior to the date of enactment of the Act;

(3) It defines what the carriers' obligations are, namely, to hire such an employee before they hire any other person, except that they may recall any of their own furloughed employees first; and

(4) It defines the seniority rights of the employees, namely, to retain their rights of seniority and recall with the original carrier while serving the carrier hiring them under the duty-to-hire plan.

Petitioners, however, state that Congress:

> left open many fundamental issues for subsequent resolution through administrative action subject to congressional review. These issues included . . . virtually all aspects of the duty to hire program, including what constitutes an 'occupational speciality,' how DOL's nationwide hiring program would operate, what showing would be required to qualify for the hiring preferences . . . .

Brief for Petitioners at 37. In reality, though, these aspects are simply the kind of routine decisions ordinarily delegated to federal agencies, and there is no indication that Congress cared about these issues. Moreover, it is difficult to even imagine a reason why Congress might have been concerned about these issues. Congress' concerns in passing the bill were with how to ease entry into new markets, how to ensure small community service, how to gradually remove controls from fares — in short, how to bring ge-

nuine competition into a system that had been regulated for decades. Although Congress was also concerned with protecting groups that might be hard hit, like labor, it goes too far to suggest that Congress was concerned with the minute details of how the labor protection provisions would work, except insofar as it would affect the U.S. Treasury.

That Congress was not particularly interested in regulating the first-hire program is further evidenced by the fact that the Secretary was required to write compensation regulations, but simply had the option of writing first-hire regulations, which even suggests that the first-hire right transcends the existence of regulations. *See McDonald v. Piedmont Aviation, Inc.*, 625 F. Supp. 762 (S.D.N.Y. 1986) (finding a private right of action independent of regulations). If Congress had felt strongly about tying the veto to the first-hire regulations, it would have insisted upon the Department of Labor issuing them.

B. The First-Hire Program Is Not Integrally Related To The Compensation Program

The Senate Report explains, to some degree, why the first-hire program was included in the bill. According to the report, the first-hire program, along with several other provisions, "will decrease the cash payments required under the program." *Senate Report* at 116. While it may therefore be true that the first-hire program has a role to play in the compensation program, there is no similar evidence that the compensation program, however suspect without the veto, is an essential part of the first-hire program. If they were essentially related, Congress would not have given the Secretary an option to write regulations in one area, and a requirement to do so in the other.

C. The Presence Of The Veto Is Not Significant In And Of Itself.

Petitioners argue that the veto must be integral to the first-hire program because section 43 is the only provision in the entire Deregulation Act that contains a legislative veto.

This argument is analogous to the argument that the veto in a hypothetical statute that is totally controlled by a veto must be important because most other statutes do not have vetoes. Both arguments basically assert that the veto is important simply because it is there, which, while true, does not shed light on *how* important the veto provision is.

D. Congressional Review Procedures Are Unique But Weak.

Finally, petitioners argue that section 43, by combining a veto, a report-and-wait provision, and a six-month deadline for issuing regulations, shows that Congress was very concerned about how the regulations would be written. Brief for Petitioners at 30-32. As previously noted, what concerns Congress had were with the financial aspects of the program, and whatever uniqueness exists in this arrangement was more likely aimed at controlling compensation. Moreover, this combination of features, while unique, is mild compared to other laws such as the Reorganization Act of 1977 which provided that:

> (A) resolution disapproving each reorganization plan would be automatically introduced in the House of Representatives and in the Senate on the first day of session allowing transmittal of the plan. 5 U.S.C. §§ 901-10. The plan would be reviewed by the Committee on Governmental Affairs of the Senate and by the Committee on

> Government Operations of the House and reported out of committee within 45 days. If the plan was not reported within 45 days, it would be placed on the calendar of the appropriate House for consideration. 5 U.S.C. § 911.

Muller Optical Co. v. EEOC, 743 F.2d 380, 382-83 (6th Cir. 1984). In comparison to an automatic disapproval resolution mechanism like this, section 43's review provisions are unique, but in a weak way.

CONCLUSION

A review of the legislative history and the statute supports the finding of the Court of Appeals that "there is not a shred of evidence that the veto provision was deemed a vital feature of the protection plan." 766 F.2d at 1565 (29a). The Court of Appeals' decision to sever the one house veto should therefore be affirmed.

Respectfully submitted,

MATTHEW H. FINUCANE
Counsel of Record
Association of Flight Attendants
1625 Massachusetts Avenue, N.W.
Washington, DC 20036
(202) 328-5400

July 18, 1986